IN THE
COURT OF APPEALS
OF
MARYLAND

No. 87
September Term, 2013

WATERKEEPER ALLIANCE, INC.,
et al.,

Petitioners,

v.

MARYLAND DEPARTMENT OF AGRICULTURE,
et al.,

Respondents.

On Writ of Certiorari to the Court of Special Appeals of Maryland

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Brief of *Amicus Curiae* Sierra Club In Support of Petitioners Waterkeeper Alliance, Inc., *et al.*

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 2

ARGUMENT 2

I. REDUCING TRANSPARENCY IN THE IMPLEMENTATION OF MARYLAND'S NUTRIENT MANAGEMENT LAWS WILL IMPERIL THE RECOVERY OF THE CHESAPEAKE BAY 2

A. The Public Policy of Maryland Favors Transparency and Open Government 2

B. Maryland's Emphasis on Citizen Involvement in the Enforcement of Environmental Protection Laws Reinforces the Presumption in Favor of Disclosure 4

C. Citizen Participation in the Regulation of Nutrient Management Plans under the Clean Water Act Provides a Clear Analogue to Citizen Participation in Nutrient Management Plans Under the Water Quality Improvement Act 5

1. The Overlap between Nutrient Management Plans under the Clean Water Act and the Water Quality Improvement Act is Significant and Meaningful 5

2. Federal Law Requires Open Public Access to NMPs under the Clean Water Act as a Bedrock of Citizen Participation in Environmental Enforcement 9

3. The Regulatory Scheme of the Clean Water Act Should Inform this Court's Understanding of the Disclosure Requirements of the Water Quality Improvement Act 12

D. Implementation of the Water Quality Improvement Act of 1998 Depends on Public Access to Nutrient Management Records 13

E. COSA's Expansive View of Secrecy under the Water Quality Improvement Act Could Contaminate Jurisprudence in any Area of the Law Involving Citizen Participation in the Enforcement of Environmental Laws and Regulations 15

II. THE COURT OF SPECIAL APPEALS OPINION OVERCOMES THE PRESUMPTION IN FAVOR OF DISCLOSURE OF PUBLIC RECORDS ONLY BY IGNORING JUDICIAL PRECEDENT, THE UNAMBIGUOUS LANGUAGE OF THE STATUTE ITSELF, AND SIMILAR NMP STATUTES 16

A. The Statutory Interpretation Inquiry for Agric. Art. § 8-801.1 Ends With the Plain Language of the Statute Itself 16

B. The COSA Interpretation Fails to Take Into Account Disclosure Requirements for NMPs Used in Similar Regulatory Schemes 20

CONCLUSION 20

TABLE OF CASES AND AUTHORITIES

CASES

A.S. Abell Publishing Co. v. Mezzanote,
297 Md. 26, 464 A.2d 1068 (1983) 3

Assateague Coastkeeper v. Maryland Dep't of the Environment,
200 Md. App. 665, 28 A.3d 178 (2011) 5

Comm. Ass'n for Restoration of the Env. v. Henry Bosma Dairy,
65 F. Supp. 2d 1129 (E.D. Wash. 1999) 9

Comm. Ass'n for Restoration of the Env. v. Henry Bosma Dairy,
305 F.3d 943 (9th Cir. 2002) 9, 14

Environmental Integrity Project v. Mirant Ash Mgmt., LLC,
197 Md. App. 179, 13 A.3d 34 (2010) 4

Fioretti v. Maryland State Board of Dental Examiners,
351 Md. 66, 716 A.2d 258 (1998) 3

Hammen v. Baltimore County Police Dep't,
373 Md. 440, 818 A.2d 1125 (2003) 3

Kirwan v. Diamondback,
352 Md. 74, 721 A.2d 196 (1998) 3

Massey v. Galley,
392 Md. 634, 898 A.2d 951 (2006) 3

Miner v. Novotny,
304 Md. 164, 498 A.2d 269 (1985) 3

Nat'l Pork Producers Council v. Environmental Protection Agency,
635 F.3d 738 (5th Cir. 2011) 9, 10

Patuxent Riverkeeper v. Maryland Dep't of the Environment,
422 Md. 294, 29 A.3d 584 (2011) 5

Sierra Club Mackinac Chapter v. Dep't of Env. Quality,

747 N.W.2d 321 (Ct. App. Mich. 2008) 9, 11, 12

University System of Maryland v. Baltimore Sun Co.,
381 Md. 79, 847 A.2d 427 (2004) 3

Waterkeeper Alliance, Inc. v. Environmental Protection Agency,
399 F.3d 486 (2d Cir. 2005) 7, 11, 12, 13

Waterkeeper Alliance, Inc. v. Maryland Dep't of Agriculture,
211 Md. App. 417, 65 A.3d 708 (2013) 8, 15, 18

STATUTES AND CONSTITUTIONS

U.S. CONST. ART. VI, § 2. 12

MD. CODE, AGRICULTURE ART. § 3-101(d) 19

MD. CODE, AGRICULTURE ART. § 3-804(c) 19

MD. CODE, AGRICULTURE ART. § 8-306(b)(1) 17-19

MD. CODE, AGRICULTURE ART. § 8-801(g) 6, 8

MD. CODE, AGRICULTURE ART. § 8-801.1. . . . . *passim*

MD. CODE, AGRICULTURE ART. § 8-803.1 14

MD. CODE, ENVIRONMENT ART. § 4-402 3

MD. CODE, ENVIRONMENT ART. § 9-301 *et seq.* 5

MD. CODE, ENVIRONMENT ART. § 9-322 5

MD. CODE, ENVIRONMENT ART. § 9-324 5

MD. CODE, STATE GOVERNMENT ART. § 10-612(b) 3

MD. CODE, STATE GOVERNMENT ART. § 10-201 *et seq.* 5

33 U.S.C. § 1251 *et seq.* 5

33 U.S.C. § 1251(e) 10

33 U.S.C. § 1311(a) 5

33 U.S.C. § 1342 5

33 U.S.C. § 1365. 9

REGULATIONS

COMAR 15.20.07.03B(11) 6, 8

COMAR 26.08.01.01(B)(53-1) 6, 8

COMAR 26.08.03.09 5

COMAR 26.08.03.09B(1)(d) 6

COMAR 26.08.03.09C(5) 6

COMAR 26.08.04.01 5

COMAR 26.08.04.01-1E. 11, 19, 20

40 C.F.R. § 122.21(i)(1)(x) 6

40 C.F.R. § 122.23(e) 10

40 C.F.R. § 122.42(e)(1) 7, 9, 10, 20

U.S. Environmental Protection Agency, Final Rule, *Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision*, 73 Fed. Reg. 70,418 (Nov. 20, 2008) 6

OTHER

Brief of *Amicus Curiae* Maryland Department of the Environment, *Environmental Integrity Project v. Mirant Maryland Ash Management, LLC*, No. 70, Sept. Term 2011, Md. Court of Appeals, 2011 WL 6986666 (Dec. 12, 2011) 4, 16

Center for Progressive Reform, *Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short* (April 2010) 14, 15

Center for Public Integrity, Global Integrity, & Public Radio International, *Maryland Corruption Risk Report Card*. 15

Maryland Department of Agriculture, *Moving Forward for the Bay: Nutrient Management Program 2012 Annual Report* 13, 14

Maryland Department of Agriculture, *Nutrient Management Annual Implementation Report for 2013* 8

Maryland Department of Agriculture, *Soil Conservation and Water Quality Plan* 18

Maryland Department of the Environment, *General Compliance Schedule for Applicants for CAFO Coverage* 11

INTEREST OF *AMICUS CURIAE*

The Sierra Club respectfully submits this brief as a friend of the Court. The Sierra Club is one of America's oldest and largest environmental organizations with chapters in every state of the U.S. Its core mission is to help protect the wild places of the earth and to promote the responsible use of the earth's ecosystems and resources. The Sierra Club has an interest in the issue before this Court because it has many members who enjoy the Chesapeake Bay and its ecosystems and who experience the direct effects of excessive nutrient pollution. In particular, the members of the Sierra Club's chapters in Maryland, Delaware and Virginia are alarmed at the deplorable state of the Bay's ecosystems. They are able to witness firsthand the collapse of the Bay's fisheries and the devastating rise of 'dead zones' in the Bay.

Many of these members living in Maryland are active in grassroots monitoring efforts for the Bay. These members have a clear interest in maintaining access to governmental records concerning discharge investigations, implementation of state and federal regulations, and the monitoring of regulatory compliance. *Amicus* intends to demonstrate that the Court of Special Appeals' opinion in this matter undercuts the transparency of Maryland's nutrient management program by restricting access to governmental records in a manner that is contrary to both judicial precedent and well-established public policy. This unnecessary secrecy undercuts the efforts of Sierra Club members to ensure that their elected representatives have complied with federal and state laws designed to protect the integrity of the Chesapeake Bay.

The Sierra Club and the Maryland Chapter in particular have a long history of advocacy for open government and unhindered public access to government records. The Maryland Chapter has been active in supporting or opposing many recent bills, including the Legislative Voting Sunshine Act (HB

107, 2010), the Nuclear Power Transparency Act (SB 460, 2011), and the Open Meetings Act (HB 1031, 2012).

Amicus therefore respectfully urges this Court to vacate the Order of the Circuit Court for Anne Arundel County and direct that Court to enter a disclosure order consistent with the plain meaning of Agriculture Article § 8-801.1(b)(2), which allows redaction *only* of identifying information in nutrient management plan (NMP) summaries held by the Maryland Department of Agriculture for three years or less.

Simultaneous with the filing of this brief, *Amicus* has filed a Motion for Permission to File a Brief as *Amicus Curiae*.

STATEMENT OF THE CASE

Amicus adopts Petitioner Waterkeeper Alliance, Inc. *et al*'s Statement of the Case.

QUESTIONS PRESENTED

Amicus adopts Petitioner Waterkeeper Alliance, Inc. *et al*'s Questions Presented.

STATEMENT OF FACTS

Amicus adopts Petitioner Waterkeeper Alliance, Inc. *et al*'s Statement of Facts.

ARGUMENT

I. REDUCING TRANSPARENCY IN THE IMPLEMENTATION OF MARYLAND'S NUTRIENT MANAGEMENT LAWS WILL IMPERIL THE RECOVERY OF THE CHESAPEAKE BAY

A. The Public Policy of Maryland Favors Transparency and Open Government

The presumption in favor of public access to governmental records is not merely an aid to legislative interpretation, it is a mandate embodied in the Maryland Code itself. State Government Article § 10-612 provides that, with

certain exceptions, the courts of Maryland shall construe the public access to records statute "in favor of permitting inspection." MD. CODE, STATE GOVERNMENT ART. § 10-612(b) (2013); *see also Kirwan v. Diamondback*, 352 Md. 74, 80, 721 A.2d 196, 199 (1998) ("The Maryland Public Information Act establishes a public policy and a general presumption in favor of disclosure of government or public documents."); *Massey v. Galley*, 392 Md. 634, 642, 898 A.2d 951, 955 (2006) (Public Information Act must be liberally construed). This presumption "reflects the legislative intent that citizens of the State of Maryland be accorded *wide-ranging access* to public information concerning the operation of their government." *Fioretti v. Maryland State Board of Dental Examiners*, 351 Md. 66, 73, 716 A.2d 258, 262 (1998) (emphasis added[1]) (quoting *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983)). A viable democratic government, this Court has written, is dependent on open and unimpeded "channels of communication between citizens and their public officials." *Miner v. Novotny*, 304 Md. 164, 176, 498 A.2d 269, 274 (1985). The presumption in favor of disclosure is thus a critical component of one of the most fundamental tenets of democratic government.

The presumption in favor of disclosure has particular relevance to the protection of the Chesapeake Bay. The long-established public policy of Maryland is that water pollution "constitutes a menace to public health and welfare," and that "the quality of the waters of this State is vital to the public and private interests of its citizens." MD. CODE, ENVIRONMENT ART. § 4-402 (2013). This public policy is evidenced by the State's long history of citizen involvement

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[1] Other opinions of this Court have observed that the emphasis in this well-known quote appeared in the original opinion. *See University System of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 87-88, 847 A.2d 427, 432 (2004). This seems to be an erroneous attribution resulting from the addition of emphasis in *Hammen v. Baltimore County Police Dept.*, 373 Md. 440, 456, 818 A.2d 1125, 1135 (2003).

in the enforcement of federal and state clean water laws. Citizen involvement in environmental enforcement, however, is effective only to the extent that information and records are readily available.

B. Maryland's Emphasis on Citizen Involvement in the Enforcement of Environmental Protection Laws Reinforces the Presumption in Favor of Disclosure

Protection of the Bay's waterways is accomplished through a myriad of statutes and agencies. Despite superficial differences, each enforcement scheme - whether implemented by the Maryland Department of Agriculture (MDA) or Maryland Department of the Environment (MDE) - is heavily dependent on the participation of the local citizenry, including many members of the Sierra Club. MDE has emphasized the critical role played by citizen participation, writing to this Court that "citizens are often the first to observe a problem, through sampling streams and rivers, walking their shores, and fishing their waters." *See* Brief of *Amicus Curiae* Maryland Department of the Environment at 2, *Environmental Integrity Project v. Mirant Maryland Ash Management, LLC*, No. 70, Sept. Term 2011, Md. Court of Appeals, 2011 WL 6986666 (Dec. 12, 2011).[2] Because of this crucial role, the "Department [of the Environment] has an interest in supporting citizen engagement in all environmental matters, including those involving the quality of waters of this State, and actively solicits citizens to come forward to identify problems they have observed." *Id.*

Citizen participation in the implementation of Maryland's water protection statutes permeates throughout virtually all of the State's enforcement schemes. Citizens may intervene in MDE's water pollution enforcement actions and seek judicial review of MDE's administrative decisions. *See Environmental Integrity Project v. Mirant Ash Mgmt., LLC*, 197 Md. App. 179, 189-90, 13 A.3d 34, 40 (2010)

[2] Petition for certiorari dismissed as improvidently granted at 424 Md. 213, 34 A.3d 1193 (2012).

(recognizing right to intervene in MDE enforcement actions, but ultimately denying citizen group's standing claim); *Patuxent Riverkeeper v. Maryland Dep't of the Environment*, 422 Md. 294, 309, 29 A.3d 584, 594 (2011) (citizen seeking judicial review under MD. CODE, ENV. ART. § 5-204(f)). Maryland citizens are also quite active in pursuing challenges to administrative actions under the State Administrative Procedure Act (APA), MD. CODE, STATE GOV'T ART. § 10-201 *et seq. See, e.g., Assateague Coastkeeper v. Maryland Dep't of the Environment*, 200 Md. App. 665, 28 A.3d 178 (2011).

C. Citizen Participation in the Regulation of Nutrient Management Plans under the Clean Water Act Provides a Clear Analogue to Citizen Participation in Nutrient Management Plans Under the Water Quality Improvement Act

1. The Overlap between Nutrient Management Plans under the Clean Water Act and the Water Quality Improvement Act is Significant and Meaningful

Nutrient management plans are regulated under many statutes, but one of the primary laws is the federal Clean Water Act (CWA), as implemented by the State of Maryland. 33 U.S.C. § 1251 *et seq.* (2013); MD. CODE, ENV. ART. § 9-301 *et seq.* (2013) (state implementation of the CWA). Under those laws, all discharges of any pollutants into the waters the U.S. are prohibited unless authorized by law or permit. 33 U.S.C. § 1311(a) (2013); MD. CODE, ENV. ART. § 9-322 (2013). Discharge permits may be issued under the National Pollutant Discharge Elimination System (NPDES) as implemented by Maryland's Department of the Environment. *See* 33 U.S.C. § 1342 (2013); MD. CODE, ENV. ART. § 9-324 (2013); COMAR 26.08.04.01 (2013).

Animal feeding operations (AFOs) in Maryland are divided into subcategories, many of which are required to obtain individual discharge permits or to obtain coverage under MDE's general discharge permit for animal

feeding operations. *See* COMAR 26.08.03.09 (2013). As part of this permitting process, regulated animal feeding operations are required to develop and submit nutrient management plans that are incorporated into the terms of their discharge permits. *See* 40 C.F.R. § 122.21(i)(1)(x) (2013) (Concentrated animal feeding operation (CAFO) permit application must include nutrient management plan); COMAR 26.08.03.09C(5) (2013) (incorporating federal CAFO regulations and requiring 'Maryland Animal Feeding Operations'[3] to develop and submit NMPs in conjunction with its application for coverage under general discharge permit); U.S. Environmental Protection Agency, Final Rule, *Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision*, 73 Fed. Reg. 70,418 (Nov. 20, 2008).

Importantly, the nutrient management plans that are developed for discharge permits and submitted to MDE are virtually identical to the nutrient management plans that are submitted to the MDA under the Water Quality Improvement Act (WQIA) at issue here. The NMP that is filed with an NPDES application shares almost the exact same definition as used in Agric. Article § 8-801, which governs NMPs under MDA's authority. *See* MD. CODE, AGRIC. ART. § 8-801(g) (2013) (defining the NMP at issue in this matter as "a plan prepared under this subtitle by a certified nutrient management consultant to manage the amount, placement, timing, and application of animal waste, commercial fertilizer, sludge, or other plant nutrients to prevent pollution by transport of bioavailable nutrients and to maintain productivity"); COMAR 26.08.01.01(B)(53-1) (2013) (defining an NMP as used by MDE by referring to MDA's definition of same at COMAR 15.20.07-08); COMAR 15.20.07.03B(11) (2013) (defining an NMP

[3] A Maryland Animal Feeding Operation is defined as a large CAFO under federal regulations that does not discharge or propose to discharge into waterways. COMAR 26.08.03.09B(1)(d) (2013).

as "a plan prepared by a certified nutrient management consultant or certified farm operator to manage the amount, placement, timing, and application of animal manure, fertilizer, biosolids, or other plant nutrients in order to: (a) Minimize nutrient loss or runoff; and (b) Maintain the productivity of soil when growing agricultural products").

It is true that the NMPs submitted to MDE under the CWA and NMPs submitted to MDA under the Water Quality Improvement Act are not identical in every way possible. But considering that federal law *mandates* open public access to NMPs under the CWA, *see* discussion below, but that Maryland specifically denies access to NMPs under its own WQIA, a close look at the differences and similarities is appropriate. It would make very little sense for two similar plans to be treated so differently by the courts, and yet the lower court opinion allows MDA plans to remain secret while MDE plans are required to be open for inspection so that citizens may enforce federal clean water laws. If it is a violation of federal law to inhibit public access to plans submitted to MDE, *see Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486, 503-04 (2d Cir. 2005), one would expect that the plans submitted to MDA would be quite different in character if they are to be so zealously guarded from view. That clearly is not the case.

> The NMPs defined in the federal CWA regulations include plans that:
>
> (i) Ensure adequate storage of manure, litter and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;
>
> . . .
>
> (vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;
> (vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil; [and]
> (viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices

> that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater.

40 C.F.R. § 122.42(e)(1)(i)-(viii) (2013). This can be compared to the nutrient management plans at issue here, which are defined as "a plan prepared . . . by a certified nutrient management consultant to manage the amount, placement, timing, and application of animal waste, commercial fertilizer, sludge, or other plant nutrients to prevent pollution by transport of bioavailable nutrients and to maintain productivity." MD. CODE, AGRIC. ART. § 8-801(g) (2013). More specifically, the plans in this case include soil samples, manure samples, descriptions of the method of manure storage and application rate, a statement of whether manure is transported to or from the operation, and a statement of how many acres are under conservation tillage or implementing irrigation runoff and leachate capture. *Waterkeeper Alliance, Inc. v. Maryland Dep't of Agriculture*, 211 Md. App. 417, 428-29, 65 A.3d 708, 714-15 (2013) (Court of Special Appeals opinion below); *see also* MDA, *Nutrient Management Annual Implementation Report for 2013*, available at http://mda.maryland.gov/resource_conservation/counties/2013AIRRegular.pdf.

Aspects that are common to both types of NMP, therefore, are:

1. Storage of manure, litter, and process wastewater;
2. Site-specific conservation practices such as conservation tillage, irrigation runoff and leachate capture;
3. Protocols for appropriate testing of manure, litter, process wastewater, and soil;
4. Site-specific land application practices.

The overlap between the two NMPs is not complete, but nearly so. Many animal feeding operations in Maryland, including those for which information was requested in this matter, submit both plans – one to MDE and one to MDA.

Although there are some differences in the day-to-day realities of how the two plans are developed and submitted, legally they are defined with virtually

identical language. *See* discussion above (comparing MDE definition at COMAR 26.08.01.01 (B) (53-1) that cross-references COMAR 15.20.07.03B(11), with MD. CODE, AGRIC. ART. § 8-801, using substantially overlapping language). This overlap can be usefully contrasted with the many *dissimilarities* between the NMPs at issue in this case and the soil conservation plans that the Court of Special Appeals found so informative. *See* Argument *supra*, II.A-B.

2. Federal Law Requires Open Public Access to NMPs under the Clean Water Act as a Bedrock of Citizen Participation in Environmental Enforcement

Under the federal Clean Water Act, citizens are explicitly permitted to file suit and to intervene in enforcement actions. *See* 33 U.S.C. § 1365(a) (citizen suits), § 1365(b)(1)(B) (right of intervention in enforcement actions). And because nutrient management plans become incorporated into the enforceable terms of a AFO's discharge permit, *see* 40 C.F.R. § 122.42(e)(1) (2013), a citizen suit under the CWA will frequently address the development and implementation of nutrient management plans. *See, e.g., Nat'l Pork Producers Council v. Environmental Protection Agency*, 635 F.3d 738, 754 (5th Cir. 2011) (upholding CAFO regulations that incorporate NMPs as an enforceable effluent limitation of the NPDES permit); *Waterkeeper*, 399 F.3d at 502 (invalidating prior CAFO regulations for failing to require that terms of NMPs be included as enforceable terms of NPDES permits); *Comm. Ass'n for Restoration of the Env. v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129 (E.D. Wash. 1999), *aff'd* 305 F.3d 943 (9th Cir. 2002) (violation of State Dairy Waste Management Plan is a violation of the CWA); *Sierra Club Mackinac Chapter v. Dep't of Env. Quality*, 747 N.W.2d 321 (Ct. App. Mich. 2008) (NPDES permit required to incorporate nutrient management plan).

Access to nutrient management information is also critical to determining whether a CWA violation has occurred from stormwater runoff. Although the CWA exempts agricultural stormwater discharges, federal regulations clarify

that this exemption extends to nutrients applied to cropland under a CAFO's control *only if* that application is in accord with a site-specific nutrient management plan. *Pork Producers*, 635 F.3d at 744; 40 C.F.R. § 122.23(e), § 122.23(e)(1) (2013). The only way to determine whether stormwater discharges from land application of nutrients is a violation of the CWA is to look at that farm's NMP. If the land application is consistent with the NMP, then there is no violation and no need for a NPDES permit. If the application is not consistent, then the operation is in violation of the CWA and must apply for a discharge permit.

Because citizen participation in Clean Water Act enforcement is such a vital component of that Act, federal law *mandates* that the public be allowed unhindered access to nutrient management plan records. The Act itself states that the public is actively encouraged to participate - with the *required assistance* of the states - in the development of "any regulation, standard, effluent limitation, plan, or program established by . . . any State." 33 U.S.C. § 1251(e) (2013). As noted above, one of these effluent limitations is the nutrient management plan that is incorporated into permits under the CWA. *See* 40 C.F.R. § 122.42(e)(1) (2013). It is therefore a matter of federal law that the public shall be *encouraged* and *assisted in* participating in the regulation of nutrient management plans administered by the State of Maryland as part of its CWA compliance. Indeed, the Second Circuit invalidated prior CAFO regulations as a violation of the CWA because they "fail[ed] to provide the public with any other means of access to [NMPs]." *Waterkeeper*, 399 F.3d at 503. By "shield[ing] the nutrient management plans from public scrutiny and comment" the regulations "impermissibly compromise[d] the public's ability to bring citizen-suits, a 'proven enforcement tool' that 'Congress intended [to be used . . .] to both spur and supplement government enforcement actions.'" *Id.* (quoting Clean Water Act

Amendments of 1985, Senate Environment and Public Works Comm., S.Rep. No. 50, 99th Cong., 1st Sess. 28 (1985)); *Sierra Club Mackinac*, 747 N.W.2d at 334 (invalidating CAFO discharge permit for failing to provide for public participation in the "development, revision and enforcement of the comprehensive nutrient management plans.").

Following this clear federal mandate, Maryland has recognized the importance of public participation in the development of nutrient management plans, and Maryland regulations specify that NMPs submitted with discharge permit applications are subject to disclosure and public review. COMAR 26.08.04.01-1E(6) (2013); *see also* MDE, *General Compliance Schedule for Applicants for CAFO Coverage* at 1, available at http://www.mde.state.md.us/programs/Land/RecyclingandOperationsprogram/AFO/Documents/Compliance_Schedule_1_rev_11-12-2013[1].pdf (last retrieved Dec. 18, 2013). An applicant may request that certain information on the application be treated as confidential trade secrets, but the EPA may reject this request, resulting in the disclosure of the information. COMAR 26.08.04.01-1E(8) (2013).

Enforcement of the Clean Water Act is thus critically dependent on access to nutrient management plan information. Without this information, the federal statute loses much of its force and violators go unpunished while they continue to pollute and degrade the Chesapeake Bay. Because there is very little difference between NMPs under the Clean Water Act and NMPs under the Water Quality Improvement Act, there is a very real risk that reduced transparency in MDA's NMP program will effectively gut the public's ability to meaningfully participate in the regulation of NMPs under the CWA.

3. The Regulatory Scheme of the Clean Water Act Should Inform this Court's Understanding of the Disclosure Requirements of the Water Quality Improvement Act

Maryland's implementation of the Clean Water Act is a regulatory scheme that is distinct from its own Water Quality Improvement Act. The treatment of NMPs under these two statutes, however, is more similar than it is distinct. The main difference is not in how the NMP is prepared or what information is conveyed, but *who* has to file the NMP and to which authority.[4] As such, federal laws and regulations concerning NMPs under the CWA may not be binding on this Court's interpretation of Agric. Art. § 8-801.1(b), but they are highly persuasive authority. Even the question of whether CWA regulations are binding on the interpretation in this case is not as clear as it may seem. To the extent that the Court's interpretation inhibits or weakens public participation in the development and enforcement of NMPs under the CWA, the actions of the MDA may be invalid on preemption grounds. *See* U.S. Const. art. VI, § 2; *Waterkeeper*, 399 F.3d at 503-04 (invalidating federal rules because "citizens would be limited to enforcing the mere requirement to develop a nutrient management plan, but would be without means to enforce the terms of the nutrient management plans because they lack access to those terms"); *Sierra Club Mackinac*, 747 N.W.2d at 334.

Even if not binding, however, the fact that the two types of NMP overlap to a high degree and the fact that they share the same legal definition means that federal (and state) treatment of NMPs under the CWA is highly persuasive authority. At a minimum, they provide additional justification for resolving ambiguities in favor of disclosure. Consider, for example, the absurdity that results from the Court of Special Appeals' interpretation: an animal feeding

[4] In short, the WQIA requires a broader set of entities to submit NMPs to the MDA, including farms that may not be subject to CWA requirements.

operation that is subject to CWA requirements submits an NMP to MDE, and that plan is subject to disclosure and public review. Any obstruction of public access to that NMP is an impediment to citizen enforcement of the CWA and a violation of federal law. *See Waterkeeper*, 399 F.3d at 503. That same animal feeding operation then submits a virtually identical NMP to the MDA to comply with its obligations under Maryland's WQIA. That NMP, however, is zealously guarded from public view, with even the plan-holder's identity alone protected for all time. This is not secrecy that has been narrowly tailored to serve a particular function or protect particularly sensitive information, it is secrecy for its own sake alone. This Court is not obligated to adopt an interpretation that produces such incoherent results. It has only to enforce the plain language of § 8-801.1(b) to avoid codifying a particularly thoughtless form of distrust and suspicion of the public.

D. Implementation of the Water Quality Improvement Act of 1998 Depends on Public Access to Nutrient Management Records

The importance of the role played by citizens in environmental enforcement has only increased as budget cuts have severely undermined state enforcement efforts. This is true for all environmental statutes, but it is particularly true for the specific statute in question in this matter – the Water Quality Improvement Act of 1998. According to MDA's 2012 Annual Report for the Nutrient Management Program, there are 5,315 farmers who are required to submit NMPs to MDA. MDA, MOVING FORWARD FOR THE BAY: NUTRIENT MANAGEMENT PROGRAM 2012 ANNUAL REPORT at 4, http://mda.maryland.gov/resource_conservation/counties/MDANMP2012.pdf (last visited Oct. 23, 2013). MDA employs eight nutrient management specialists to conduct on-farm audits and follow-up inspections; each specialist thus has a caseload of 664 farms. *Id.* Only 10% of Maryland's farmers received on-farm visits from MDA compliance

specialists. *Id.* at 4-5. The results of these audits confirm that 35% of the farmers audited were not in compliance with the "major provisions of the regulations." *Id.* at 4-5. Eight per cent of the farmers audited were cited for over-application of nutrients, which, if representative of the entire state, would indicate that approximately 425 farms in Maryland are currently applying nutrients in excess of their NMPs. *Id.* at 5. Each of these instances of over-application of nutrients are potential violations of both the WQIA, *see* MD. CODE, AGRIC. ART. § 8-803.1 (2013), and possibly the Clean Water Act. *See, e.g., Comm. Ass'n for Restoration of Env. v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002).

Given these numbers, it is entirely reasonable to assume that numerous violations of the WQIA and CWA, each of which appreciably degrades the Bay's ecological integrity, have gone unnoticed and unaddressed. The citizens of Maryland are on the front lines of these issues and are well-placed to observe, monitor, and report instances of NMP violations. The opinion of the court below eliminates this enforcement mechanism and places sole responsibility for the Bay's protection with understaffed and overworked state agencies. This directly jeopardizes the health of the Chesapeake Bay watershed.

The elimination of a key enforcement mechanism is part of a wider pattern of insufficient regulatory protection for the Bay in Maryland. Recently a report summarized the views of a variety of stakeholders that included state and federal officials, members of the regulated community, and members of public interest groups. Center for Progressive Reform, *Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short* at 4 (April 2010), available at http://www.progressivereform.org/articles/mde_report_1004FINALApril.pdf (last retrieved Nov. 19, 2013). These stakeholders concluded that the CWA enforcement efforts of MDE were inadequate to protect the Bay. *Id.* at 6. MDE is drastically underfunded and understaffed with a particular dearth of inspectors,

relying mostly on paper reviews of monitoring reports to assess compliance. *Id.* at 4. Many stakeholders also emphasized that MDE fails to take advantage of citizen suits as a supplemental enforcement mechanism. *Id.* at 3.

This pattern is also evident in Maryland's record of compliance with open government laws. The State Integrity Investigation rated Maryland 40th overall, with a grade of D-minus. *See* Center for Public Integrity, Global Integrity, & Public Radio International, *Maryland Corruption Risk Report Card*, available at http://www.stateintegrity.org/maryland (last retrieved Nov. 19, 2013). Maryland received an F in the category of 'Public Access to Information,' as the right of access to information was found to be ineffective. *Id.* The opinion below reaffirms this unfortunate record by eviscerating the right of access to nutrient management plan information. Enforcement of the plain language of Agric. Art. § 8-801.1(b) will offer some counterpoint to the poor record of secrecy.

E. COSA's Expansive View of Secrecy under the Water Quality Improvement Act Could Contaminate Jurisprudence in any Area of the Law Involving Citizen Participation in the Enforcement of Environmental Laws and Regulations

Viewed in its proper context, the opinion of the Court of Special Appeals below is therefore alarmingly broad in its interpretation of the Water Quality Improvement Act. The opinion defers to the state agency in its confidential treatment of "**all nutrient management plan information submitted**." *Waterkeeper Alliance*, 211 Md. App. at 440, 65 A.3d at 721 (emphasis supplied by COSA). It then broadened the scope of protection even further, holding that the information must be kept confidential for all time, regardless of the statutory language to the contrary. *Id.* at 454-55, 65 A.3d at 730. If the courts can expand the secrecy of Maryland's nutrient management laws so handily, there is no impediment to interpreting similar laws thusly, which would effectively shut down open access to any variety of nutrient management information submitted

to the Maryland State government. This increase in secrecy would have direct impacts on the protection of the Bay, as Maryland citizens would no longer have the information needed to fulfill their roles as the first lines of defense in the prevention of nutrient pollution. This would undercut a means of enforcement explicitly relied upon by MDE. *See* Brief of *Amicus Curiae* Maryland Department of the Environment, *supra* at 2.

In sum, the extension of secrecy to *all* nutrient management plan information on any documents, not just NMP summaries, presents an unjustified risk that secrecy will flow into many different areas of environmental protection for the Bay, including federal and state Clean Water Act laws.

II. THE COURT OF SPECIAL APPEALS OPINION OVERCOMES THE PRESUMPTION IN FAVOR OF DISCLOSURE OF PUBLIC RECORDS ONLY BY IGNORING JUDICIAL PRECEDENT, THE UNAMBIGUOUS LANGUAGE OF THE STATUTE ITSELF, AND SIMILAR NMP STATUTES

A. The Statutory Interpretation Inquiry for Agric. Art. § 8-801.1 Ends With the Plain Language of the Statute Itself

Amicus adopts Petitioner's argument regarding the intermediate court's failure to properly interpret Agric. Art. § 8-801.1(b) according to its plain language. As a party with a particular interest in this matter, separate from the interest of Petitioner, *Amicus* would like to address some additional concerns that it has with the statutory interpretation of the COSA opinion.

Chiefly, the intermediate court looked to other statutes in the Maryland Code in order to expansively interpret Agric. Art. § 8-801.1 well beyond the limits of the language itself. But in doing so, the Court of Special Appeals was highly selective in which statutes it looked to for comparison, essentially performing a policy-selection function rather than adjudicating.

The lower court opinion looks to Agric. Art. § 8-306 as a point of reference to determine whether NMP summaries are to be kept confidential for three years

or for all time. That law directs soil conservation district supervisors to "maintain information from a soil conservation and water quality plan in a manner that protects the identity of the person for whom the plan is prepared." MD. CODE, AGRIC. ART. § 8-306(b)(1) (2013). The court essentially substitutes this language into § 8-801.1(b)(2) in the place of that statute's three-year limitation. Of course, if the General Assembly had intended the statutes to operate identically, it presumably would have used similar language instead of including a three-year limitation. If the court wanted to harmonize these two statutes, it could have done so by reading a three-year limitation *into* § 8-306, rather than reading the limitation *out of* § 8-801.1. Both options are logically identical (if, indeed, harmonization is even appropriate), yet the court chose the more restrictive option, against the clear presumption in favor of disclosure. If there is a conflict between these two statutes, Maryland law requires that it be resolved in favor of disclosure, not secrecy. *See* Argument at I.A, *supra.*

Rather than resolve the matter with traditional methods of statutory interpretation, the lower court has assumed the role of policy arbiter to decide the matter. It looks not to Maryland common law, but to the presumed policy allegedly intended by the state Legislature. The court concluded that unless NMP information is protected for all time, as opposed to only three years, it would frustrate the purpose of § 8-306 because "soil conservation and water quality plans would be forever exempt from disclosure."[5] Crucially, however, in

[5] *Amicus* finds this phrase ambiguous. It appears that the Court of Special Appeals meant that allowing unredacted disclosure of NMP information (submitted under § 8-801.1) after three years would frustrate § 8-306 because it could reveal the identity of NMP plan holders whose identity would otherwise be protected (under § 8-306). In that case the court presumably meant to use the phrase 'subject to' rather than 'exempt from.' As a factual matter, however, it is not at all clear that disclosure of the identity of NMP holders under the WQIA would subject their soil conservation plans to disclosure, nor that their identity as

this case whether or not such an interpretation would frustrate § 8-306 is a matter of policy, not law. It could very well be the case that the Legislature intended identifying information to be more assiduously protected for soil conservation and water quality plans than for nutrient management plans. Indeed, that would make eminent sense, for as the court itself noted, the regulatory scheme for soil conservation in general is much broader than the nutrient management scheme of the Water Quality Improvement Act. *See Waterkeeper Alliance*, 211 Md. App. at 445, 65 A.3d at 724-25. NMPs (under both the CWA and the WQIA) address only one aspect of agricultural operations – the land application of nutrients. Soil conservation and water quality plans under § 8-306 cover a much broader range of farm activities to address sediment pollution, not nutrient pollution. Soil conservation and water quality plans are comprehensive plans covering every aspect of farm operation, including best management practices for soil erosion, soil runoff, cover crops, waste storage, crop rotation, seeding, tillage, and fertilization, as well as a soil map of the entire property and implementation schedules for the farmer's reference. *See* MDA, *Soil Conservation and Water Quality Plan*, available at http://mda.maryland.gov/resource_conservation/Documents/scwqplan.pdf (last retrieved Nov. 19, 2013). If the Legislature intended for the protection of information under the WQIA to be as expansive as for soil conservation in general, it is obligated to say so. The Court's mandate to say what the law is does not extend to wholesale legislative revision.

The Circuit Court made a similar error in evaluating the purpose of the privacy protections of § 8-801.1(b) when it ruled that the identity of a NMP

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holders of soil conservation plans would be readily ascertainable. The two types of plans are wholly separate – one addresses nutrient pollution, the other addresses sediment pollution and general farm management practices. In short, the plain language of § 8-801.1(b) does not 'frustrate' the language of § 8-306 in any way.

holder must be protected beyond three years, in contrast to the statute's plain language. Any other result would render the privacy protection meaningless, the Court argued. *See* Feb. 19, 2009 Memorandum Opinion of Circuit Court for Anne Arundel County at 7 (Docket Entry No. 36). Yet it can hardly be said that a privacy protection scheme is meaningless unless it is extended into perpetuity, rather than protecting information for a defined time period. When considering how to protect a plan holder's identity, the Legislature has many options to choose from. It may protect information for a limited time, it may protect it forever, or it may protect information on a case-by-case basis. If a case-by-case approach is chosen, the statute may either protect all information and allow particular disclosures, *see, e.g.,* MD. CODE, AGRIC. ART. § 3-101(d), 3-804(c) (2013) (protecting identity but allowing disclosures necessary to protect public health), or it may disclose all information and allow protection only on a showing of need, *see, e.g.*, COMAR 26.08.04.01-1E(6)-(8) (2013).

Here the legislature chose to protect identity for a specified period of time, but the Circuit Court and the Court of Special Appeals assumed that the legislature misspoke, and actually intended it to be protected for eternity. This assumption betrays a policy belief, not a judicial principle. The courts cannot interfere with the Legislature's choice in this matter without engaging in judicial lawmaking. If it is true that 3 years of identity protection is inadequate, as Respondents argue, that conclusion is a policy conclusion that must be made by the General Assembly, not the courts. Yet this is exactly what the Respondents ask this court to do, and unfortunately that is what the Court of Special Appeals has done here, by holding that identifying information must be protected for all time.

B. The COSA Interpretation Fails to Take Into Account Disclosure Requirements for NMPs Used in Similar Regulatory Schemes

By looking only to Agric. Art. § 8-306 in its attempt to discern a common statutory scheme, the Court of Special Appeals was unnecessarily myopic. The prevention of pollution in the Bay encompasses many statutes, and isolating only one of those statutes for comparison gives a false impression of coherence. The Court's selection of § 8-306 is all the more peculiar for its clear differences with the statute at hand here, as Petitioners describe. If the Court does look to other statutory provisions for illumination on the Legislature's intent, it must look beyond Agric. Art. § 8-306 to other laws that specifically address nutrient management rather than soil erosion. As noted above, EPA regulations require that entities subject to the Clean Water Act submit NMPs with their NPDES permit applications, which then become an enforceable part of the NPDES permit. See 40 C.F.R. § 122.42(e)(1) (2013). Maryland regulations provide that NPDES permit applications are subject to public inspection (along with the NMPs), but that applicants can request redaction of trade secrets, and that the EPA can review these requests and reject them if it believes that the information is not protected. COMAR 26.08.04.01-1E(6) (2013).

Rather than demonstrating a common scheme of secrecy, these related nutrient management statutes demonstrate the *variety* of different forms of protection of personal information. The privacy right asserted by NMP holders is far from absolute; instead, the right to keep NMP information private is often secondary to the need to provide adequate protection against nutrient pollution in the Bay.

CONCLUSION

For the foregoing reasons, and for the reasons cited in the Brief of Petitioners, *Amicus* respectfully requests that this Court vacate the judgment of

the Circuit Court for Anne Arundel County and remand this matter to that Court for proceedings consistent with the plain language of Agric. Art. § 8-801.1(b)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 2013, two copies of the foregoing Brief of *Amicus Curiae* was sent via first class mail to:

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